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January 29, 1993

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Mr. Bradley Litchfield
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Litchfield:

AOR 1993-02

The Democratic Senatorial Campaign Committee ("DSCC") requests an Advisory Opinion clarifying the application of the party "coordinated expenditure" provisions at 2 U.S.C. § 441a(d) of the Federal Election Campaign Act of 1971, as amended, to the pending special election to the United States Senate in the state of Texas.

Texas Senator Lloyd Benson's nomination by President-elect Clinton to the position of Secretary of the Treasury of the United States requires the Governor of Texas to appoint an individual to temporarily hold Senator Bentsen's seat until its occupancy is settled by a special election this Spring. Candidates from all parties, including any independents, will compete in this special election. Under Texas law, if no candidate receives a majority of votes, a run-off will occur to determine who will hold the seat until the next regularly scheduled election in 1994. Texas Election Code Ann. § 203.003 (Vernon 1986).

Although Advisory Opinion 1983-16, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5717 (June 10, 1983), appears to address this question directly, there is some cause for concern in the wake of the Commission's consideration of Advisory Opinion Request 1992-39 submitted by the National Republican Senatorial Committee ("NRSC"). Therefore, the DSCC thought it prudent to obtain additional clarification of the questions presented under Section 441a(d) for special elections like those likely to be held in Texas this year.

The question presented, and apparently resolved by Advisory Opinion 1983-16, is whether Section 441a(d) confers a single spending limitation on parties supporting candidates in a special election together with any run-off. The facts here and in the upcoming Texas election are indistinguishable. The Opinion 1983-16 clearly states that in these circumstances the

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run-off is considered a "continuation" of the original special election. No additional spending under 441a(d) beyond the limit it normally provides is available to the party committees in supporting candidates for both the special and run-off. Indeed, Advisory Opinion 1983-16 superseded an opinion of counsel (OC 1976-7) concerning the application of Section 441a(d), then Section 608(f), to a Texas special election. This suggests that the Commission views the facts presented in both opinions as similar and would apply the same rule in Texas.

Some confusion now surrounds Advisory Opinion 1983-16, however, as a result of the Commission's failure to reach a decision in response to the request of the NRSC in AOR 1992-39. NRSC sought guidance on its spending authority in the run-off immediately following the general election held on November 3, 1992 for the United States Senate in the state of Georgia. This election also failed to produce a majority winner. Under the unique provisions of Georgia law, a run-off was held. The Commission divided on the question; three Commissioners -- all of them Republicans -- refused to apply Advisory Opinion 1983-16 to restrict Section 441a(d) spending to a single limit for the general election and the run-off.

DSCC, which will make expenditures under Section 441a(d) as agent for the State Democratic Committee of Texas and the Democratic National Committee, seeks clarification of this point. Advisory Opinion 1983-16 appears to be good law, at least as applied to special elections and their run-offs. In response to the NRSC's request, none of the three Commissioners who prepared statements suggests that Advisory Opinion 1983-16 does not apply to a special election like the one addressed in that opinion. See Statement of Commissioners Joan D. Aikens and LeeAnn Elliott on Advisory Opinion Request 1992-39; Statement of Commissioner Trevor Potter to Advisory Opinion Request 1992-39.¹ That opinion did not concern a run-off following an inconclusive general election as occurred in

¹While Commissioner Potter disagrees with the conclusion in Advisory Opinion 1983-16 at least as applied to the specific facts in 1992-39, he states that a rulemaking would be required to reverse the Commission's position taken in 1983-16. Thus, until the Commission concludes such a process, Advisory Opinion 1983-16 would apply to materially indistinguishable facts as presented here.

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Georgia this year. Rather, it addressed the circumstances of a special election, like the one pending in Texas, which under state law led to a run-off if no majority winner emerged from the first round. In those circumstances, the Commission stated unambiguously that one 441a(d) limitation would apply throughout the entire election process -- both the original special and the run-off necessitated by the absence of a majority winner.

The Texas circumstances described here are no different. Therefore, DSCC requests clarification that only one limit, calculated as set forth in Section 441a(d), may be lawfully made available to the parties for the Texas special election, including the run-off, planned for May of this year.

Very truly yours,



Robert F. Bauer
Counsel to Democratic Senatorial
Campaign Committee

RFB:dml